

DEPARTMENT OF BOATING AND WATERWAYS

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**May 15, 1997**

**INFORMATION LETTER**

**TO: BROKERS AND SALESPERSONS**

**FROM: YACHT AND SHIP BROKER LICENSING UNIT**

**SUBJECT: LISTING AGREEMENTS, FIDUCIARY DUTY DEFINED, BROKER SUPERVISION OF TRANSACTIONS OF SALESPERSONS, COMPLAINT RESOLUTION PROCEDURE, CONSUMER PROTECTION BROCHURE, SURVEYORS - AVOIDING A CONFLICT OF INTEREST, LICENSING FEE INCREASE, RETURNED CHECK CHARGE, USE OF SALESPERSONS LICENSE NUMBER**

**1. LISTING AGREEMENTS.** The Attorney General's Office informed the Department that "**exclusive**" listing agreements must have a specific commencement date and a specific expiration date, using calendar time (days, months, year).

Brokers are no longer permitted to use "until sold, exchanged or traded" as an expiration period on "exclusive" listing agreements. Moreover, sellers do not have to cancel their listings by written letter or any type of notice. The expiration date is the date the contract terminates.

Exclusive Listing Agreements signed on June 10, 1997, or after, must comply with this directive. Brokers who have current exclusive listing agreements that do not meet this criteria (and whose exclusive listing agreements were in existence prior to June 10, 1997), will be permitted to "grandfather" these listing agreements into the current compliance requirement that becomes effective on June 10, 1997.

The Department apologizes for any inconvenience this may cause brokers.

**2. FIDUCIARY DUTY DEFINED.** (Excerpted from Black's Law Dictionary). Every licensed broker and salesperson has a fiduciary duty to both buyer and seller, even if one broker holds the listing for the seller, and another broker brings in the buyer.

A fiduciary is a person holding the character of a trustee, or a character like that of a trustee. In this regard, a fiduciary is required to have and to show good faith and honesty and openness with the person who puts his or her trust and confidence in a broker/salesperson. Such a relationship exists when a buyer or seller gives their faith, confidence and trust, and relies upon the judgement and advice of the broker/salesperson. A person having a fiduciary **duty** created by this undertaking, acts primarily for the benefit of others.

A “fiduciary relationship” arises whenever confidence is given on one side, and domination and influence result on the other. It exists where there is special confidence given to a broker/salesperson, who in equity and good conscience is bound by such a duty to act in good faith and with **due regard** to the interests of buyers and sellers.

In a “fiduciary relationship,” the law raises the rule that a broker/salesperson may not exert negligent influence or pressure, or take selfish advantage of such trust, or deal with the subject matter of the trust in such a way as to benefit him or herself or prejudice the person who places such faith and confidence in a broker/salesperson.

Brokers/salespersons must exercise their duties with the utmost good faith, fidelity and integrity, and with the full knowledge and consent of the person giving such trust.

In a “fiduciary relationship,” brokers/salespersons have a duty that totally prohibits taking advantage of the forgetfulness or negligence of the person who gives a broker/salesperson their trust and confidence. A breach of fiduciary responsibility would make the licensed broker/salesperson liable for any damage caused by such a breach of duty.

An **example** of a breach of a broker’s fiduciary duty, which would occur through negligence (despite the good intentions of the broker), is as follows:

(a) A seller signs a listing agreement to sell a **1988** vessel and provides the broker with **verbal** information about the vessel; year, make, model, its features, gear, machinery, equipment, seaworthiness, etc.

(b) From this information the listing broker creates a specification sheet. The seller even stipulates in writing that all of the information he provided to the broker is true and accurate to the best of his knowledge, and the listing broker then advertises the vessel for sale. Thereafter the vessel is sold.

(c) After the conclusion of the transaction, and **after** final payment is disbursed and the Certificate of Ownership is given to the buyer, the buyer discovers from the Certificate of Ownership that the vessel is a 1987 -- not a 1988. The buyer asks the broker to compensate him for the price difference between the 1987-88 model, claiming the broker was negligent in the way the vessel was represented.

(d) The broker denies any wrong doing, shows the buyer written proof that the seller stipulated that the vessel was a 1988, which proves the broker was “acting in good faith.” The broker declines to accept responsibility, suggesting instead that it was the seller who provided the faulty information.

**QUESTION: Was the broker “negligent” even though he acted under the “good faith” belief that the seller gave him accurate information to begin with? Did the broker breach his fiduciary duty to the buyer? YES!**

The broker had a **duty** to examine the Certificate of Ownership document (or a copy of it) before the listing agreement was even signed. How else can the broker know that the property being sold really belongs to the owner? Or otherwise verify the facts stipulated by the seller of the vessel, such as the year, make, and model.

Does a broker have to verify everything? No. The broker can stipulate that (s)he cannot be held liable to verify the accuracy of those things commonly revealed through a survey.

The Department considers it essential for brokers to make full and complete disclosures (to the best of their knowledge) about a vessel and its conditions, and what a broker does not know about a vessel must also be disclosed. Brokers should not rely on the accuracy of all of the information provided by the seller. It is practical to verify that the seller is the actual owner of the vessel during the signing of the listing agreement by simply having the seller show proof of ownership. It may not be practical (geographically) to verify hull or engine identification numbers, especially if the vessel and the broker are in different cities. Nor would the Department expect brokers to do the impossible, or what is not practical. In large measure, common sense and due diligence should apply and a broker/salesperson should always consider the possible side effects of any business practice that may run contrary to a licensee’s fiduciary duty, which hinges on disclosure.

In the “example case,” the buyer who put his trust and confidence in the broker wound up paying more for a boat than it was actually worth, and was misled in the process, despite the broker’s good intentions. And while the broker did not take responsibility for the “mistake” (and blames the seller for it), he still collects his full commission.

**3. BROKER SUPERVISION OF TRANSACTIONS OF SALESPERSONS.** For purposes of clarification, the Department expects brokers to supervise the sales transaction of licensed salespersons **as these transactions occur**, not after they have been completed. This is a broker’s duty. Broker supervision assures consumer protection and it also insures that licensed salespersons, especially during their first year as an apprentice, correctly learns the skills and applies the professionalism and ethics expected of **all licensees**. Licensed salespersons have the same fiduciary duty to their principals as do brokers. For licensing purposes, a salesperson is an agent of the broker and a broker is financially responsible for the wrongful acts of licensed salespersons.

According to the Attorney General's Office, "..... the purpose of the Yacht and Ship Brokers Act is to insure the broker's responsibility and answerability as a licensee for acts and omissions of himself and licensed salesmen employed by him when engaged in the performance of activities for which a license is required." The Attorney General's opinion is supported by Section 2338 of the California Civil Code, which reads as follows: "Principal's responsibility for agent's negligence or omission. Unless required by or under the authority of law to employ that particular agent, a principal is responsible to third persons for the negligence of his agent in the transaction of the business of the agency, including wrongful acts committed by such agent in and as a part of the transaction of such business, and for his willful omission to fulfill the obligations of the principal."

A broker's responsibility for the wrongful acts of licensed salespersons does not relieve the salesperson from being held to a standard of accountability, which could include civil penalties, license revocation or suspension.

**4. COMPLAINT RESOLUTION PROCEDURE.** The California Yacht Brokers Association (CYBA) has requested, and the Department has agreed, that brokers should be given a copy of the letter of complaint, rather than having the Department paraphrase the allegations, as has been the Department's policy. However, if a complainant asks to remain anonymous, the Department will honor that request during the course of the investigation, and will continue to paraphrase the allegations in the complaint when the broker is first notified that a complaint has been filed. The Department will then ask the broker to open his or her record of the transaction and provide his or her version of what transpired. At the conclusion of the investigation, a copy of the letter of complaint can be released to the licensee against whom the complaint is made, **but the identity of the complaining party and any information that may lead to the identity of the complainant will remain confidential, pursuant to the provisions of the Information Practices Act.**

Licensees should also understand that the Department can act upon a telephonic or in person complaint, pursuant to Section 734(b) of the Yacht and Ship Brokers Act (Act). Some brokers have taken exception to the Department's interpretation of the wording in 734(b), and contend that a complaint, in order to be valid, must be in written form before the Department can legally conduct an investigation.

Please note that 734(b) of the Act begins by stating that, "**The Department *may* upon its own motion...**" The word "***may***" allows the Department the option to determine whether it will or will not conduct an investigation. The words ***may upon its own motion*** is also sufficient to allow the Department to act upon a non written complaint. Section 734(b) continues by stating "**... and *shall* upon the verified written complaint of any person...**" The word "shall" requires the Department to investigate verified written complaints.

The complete text of Section 734(b) reads as follows:

***“The department may upon its own motion and shall upon the verified written complaint of any person which sets forth facts which could be grounds for the denial, suspension, or revocation of a license pursuant to this article, investigate the actions of any broker or salesman whether or not licensed.”***

The CYBA has also asked the Department to “soften” the initial “boiler plate” letter sent to brokers informing them that a complaint has been filed. Apparently, a number of brokers felt that our initial letter conveyed some inference that “guilt/violation” had already been established.

The Department is more than willing to honor CYBA’s request, as it has never been our intention to convey anything other than (a) a complaint has been filed, (b) the allegations are as follows, (c) please provide copies of the following documents by (a given date), and (d) include your version of the events that transpired during the transaction.

The Department has already gone one step further in this process, as a courtesy, by telephoning brokers to provide advance notice (prior to a written notice), that a complaint has been filed, which allows for a discussion with the broker and also to establish that the Department’s job, (in terms of conducting an investigation) is one of fact-finding. In other words, information must be collected and analyzed prior to making any determination about whether a violation of the Act has or has not occurred.

CYBA was provided a revised “boiler plate” letter advising brokers that a complaint had been filed with the Department, and advised by its president on April 2, 1997, that the revision was acceptable.

**5. CONSUMER PROTECTION BROCHURE.** The Department wants to develop a brochure that assists the public in the buying and selling of brokered vessels, and we have asked the CYBA to help us with this joint publication. Ms. Sherry Cameron, the broker of Cameron’s Cove Yacht Sales will take the lead in this effort on behalf of the CYBA. Specific topics have not been selected, but ideas that have surfaced thus far focus on: listing agreements, offers to purchase, surveys, selecting the right surveyor, selecting the right vessel, buying and selling a vessel, a licensee’s fiduciary duty, disclosure requirements, trust accounts, bond requirements, financing, insurance, documentation, unlicensed brokers, complaint resolution, CYBA arbitration, professionalism, broker ethics, etc.

The Department would like to solicit as much input as possible from brokers and salespersons on what you think the specific topics should include and cover. At the same time, the Department encourages licensees to contribute specific language under a topic heading that would help clarify the most important information you believe the public needs to know. This is your industry, and we urge you to contribute your knowledge and experience as a way of improving upon and publicly advertising your licensed occupation and what it involves.

The Department and the CYBA believe that such a brochure will help the public and the industry as a whole.

Please send your thoughts and ideas to:

**Ms. Sherry Cameron**  
**Cameron's Cove Yacht Sales**  
**2024 Glen Cove Road, Glen Cove Marina**  
**Vallejo, California 94591**  
**Marina: (707) 645-1636**  
**Benicia: (707) 745-8979**  
**Facsimile: (707) 645-1936**

In approximately 60 days, the Department and the CYBA will consider all of the suggested input and work on finalizing a list of specific topics, language, and photographs the brochure should include.

**6. SURVEYORS - AVOIDING A CONFLICT OF INTEREST.** It is common practice in the industry for a broker to offer a list of surveyors to buyers, which allows buyers to make their own selection if they choose to have a vessel surveyed. Surveyors are not licensed; anyone, with little or no experience can be a "surveyor." During a number of site visits to brokerages, the Department has found that many brokers recommend or offer the name of only one surveyor to a buyer. In order to avoid a "conflict of interest," the Department recommends that brokers offer the buyer a selection list of **at least three (3) marine surveyors** or refer the buyer to a lending institution (who often has a selection list of surveyors), or simply advise buyers to find their own surveyor through other sources (perhaps through a marine or telephone directory), or the National Association of Marine Surveyors (800-822-6267).

**7. LICENSING FEE INCREASE.** The cost of fingerprinting has increased by \$10.00 and this increase has been added to the cost of salesperson licensing. The complete cost is now \$192.00

**8. RETURNED CHECK CHARGE.** On June 1, 1997, the Department will charge \$15 on all returned checks marked "nonsufficient funds."

**9. USE OF SALESPERSON'S LICENSE NUMBER.** The salesperson's license number should be recorded on the Broker-Salesman Relationship Agreement, pursuant to the requirement that such an agreement be in place.

If you have questions about this Information Letter or would like further clarification, please contact James Testa at (916) 445-5685 or by Facsimile at (916) 327-7250.